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Nos. 80-895 and 80-936
(consolidated with No. 80-757)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

v.

NEIL LEIST, PHILIP SMITH, AND INCOMCO,
Respondents.

HEINOLD COMMODITIES, INC., THOMSON & MCKINNON, AUCHINCLOSS, KOHLMEYER, INC.,
Petitioners,

v.

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v.

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Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF FUTURES INDUSTRY ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF FUTURES INDUSTRY ASSOCIATION, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

FUTURES INDUSTRY ASSOCIATION, INC. ("FIA"), respectfully moves pursuant to Rule 36 of the Rules of the Su-

preme Court of the United States for leave to file the accompanying brief *amicus curiae* in support of petitioners Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc. and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc. A writ of certiorari to the United States Court of Appeals for the Second Circuit was granted on February 23, 1981, as was FIA's motion for leave to file a brief *amicus curiae* in support of the petition for that writ.

While petitioners have agreed to FIA's appearance as *amicus curiae,* respondents once again have refused to give their consent. Therefore, we must proceed by this motion.

Petitioners and FIA contend that the court of appeals erred in implying a private right of action for monetary damages against futures commission merchants ("FCMs") under the Commodity Exchange Act (the "Act"), 7 U.S.C. §§ 1-24 (1976 & Supp. II 1978). This holding is contrary to the decisions of this Court, the language and structure of the statute, and the legislative history of the Act.

FIA is a not-for-profit corporation whose 171 members and associate members are FCMs, commercial users of futures markets, and others interested in futures trading, including major banks. FIA and its members are active in the trillion dollar futures industry. In 1980 there were over 92.1 million commodity futures contracts traded on United States contract markets.* FIA estimates that its FCM members effect more than eighty percent of the trades executed on behalf of members of the public.

The purposes of FIA are to act as a spokesman on behalf of the futures industry; to increase public knowledge

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* A contract market is an exchange designated by the Commodity Futures Trading Commission to maintain a market for trading futures contracts. *See* Act § 4, 7 U.S.C. § 6 (1976).

of the economic purposes of futures trading; to encourage public use of the futures markets; to maintain high ethical standards in the futures industry; to assemble, preserve, and furnish to its members, exchanges, and the public accurate and reliable information and statistical data regarding futures trading; and, in general, to facilitate the exchange of ideas with contract markets, members of FIA, and the federal and state governments in order to promote and preserve free futures markets for the benefit of persons who trade futures contracts and the public.

The Second Circuit's decision, if permitted to stand, will have enormous implications for FIA's members. It will leave FCMs subject to conflicting interpretations of the Act by the Commodity Futures Trading Commission and federal courts and expose them to the burden of defending their actions in overlapping, redundant proceedings. This will fragment the uniform regulatory scheme created by Congress to govern the complex, national futures markets and disturb the comprehensive web of enforcement mechanisms created to ensure the Act's effectiveness.

While petitioners in this case have filed detailed, persuasive briefs in support of their position, FIA believes that a number of questions of statutory construction, legislative history, and the case law of this Court require amplification.

Specifically, these questions include the structure and language of the Act, certain aspects of the legislative history, the significance of Congress' creation of a reparations proceeding, and the significance of Congress' express recognition in 1978 of state parens patriae proceedings. FIA believes that these factors are persuasive in determining whether to reverse the decision of the Second Circuit.

THEREFORE, FIA respectfully requests leave of this Court to file the accompanying brief *amicus curiae* in support of the petitioners.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF FUTURES INDUSTRY ASSOCIATION, INC., IN SUPPORT OF THE PETITIONERS

This brief is submitted on behalf of Futures Industry Association, Inc., ("FIA") as *amicus curiae* in support of the petitioners Clayton Brokerage Co. of St. Louis, Inc., Heinold Commodities, Inc., and Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.

Statement of Interest

FIA is a not-for-profit corporation whose 171 members and associate members are futures commission merchants ("FCMs"), commercial users of futures markets, and others interested in futures trading, including major banks. FIA estimates that its FCM members effect more than eighty percent of the commodity futures trading activity on United States contract markets[1] on behalf of members of the public. The decision of the United States Court of Appeals for the Second Circuit leaves FCMs subject to conflicting interpretations of the Commodity Exchange Act ("the Act"), 7 U.S.C. §§ 1-24 (1976 & Supp. II 1978) by the Commodity Futures Trading Commission ("CFTC")[2] and federal courts and imposes on FCMs the burden of defending their actions in overlapping, redundant proceedings.

FIA submits that the Second Circuit's decision conflicts with the decisions of this Court, the language and structure of the Act, and the legislative history of the Act, all of which lead to the conclusion that Congress did not intend to create a private right of action. In reaching this same conclusion, the Fifth Circuit recently wrote,

> After our analysis of the legislative material and decisions of other courts on this question, we might add that in this metaphysical pursuit of prescience the

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[1] A contract market is an exchange designated by the Commodity Futures Trading Commission to maintain a market for trading futures contracts. *See* Act § 4, 7 U.S.C. § 6 (1976).

[2] The CFTC is a governmental body whose role with respect to futures trading is analogous to that of the Securities and Exchange Commission with respect to securities. However, because of the substantial differences between futures trading and securities trading, *see* H.R. Rep. No. 975, 93d Cong., 2d Sess. 71 (1974), the powers of the two commissions, and the regulatory scheme enforced by each, vary greatly.

> mind often snatches at shadows and mirages in its attempt to discern evidence of such congressional design —a singularly inappropriate base upon which to predicate an implied private cause of action.

Rivers v. *Rosenthal & Co.*, 634 F.2d 774, 792 (5th Cir. 1980).

FIA believes that the Second Circuit's decision must be reversed.

Summary of Argument

The Second Circuit failed to properly analyze the question under the paradigm established by this Court's decisions. If the statutory language does not reveal a congressional intent to create a private right of action, then only clear evidence in the legislative history of an intent to create a private right of action will be sufficient. The Second Circuit reversed these presumptions by looking first to the legislative history instead of the language of the statute and by requiring that legislative history to reveal a clear intent not to create a private right of action.

The Act has an elaborate scheme of enforcement mechanisms designed to deter violations of the Act or CFTC rules by FCMs and to provide compensation to persons injured by those violations. Nowhere does Congress mention private rights of action for persons like plaintiffs here, although it does expressly provide for actions against FCMs by others. In addition, Congress has created a reparations proceeding designed to replace private actions in court as the means for vindicating the rights of those wronged by FCMs. This per se precludes a finding that Congress intended a private right to exist unless there is clear, persuasive evidence in the legislative history to the contrary. The majority below could point to no such legislative history, and the history they cite, as well as evidence not men-

tioned in the majority opinion, indicates a clear intent not to create a private right of action against FCMs.

The Act, by its terms, does not confer a right on any particular group, but merely creates duties and obligations. It therefore was not enacted for the benefit of an especial class, and the proponents of a private right of action must therefore sustain the burden of demonstrating through clear legislative history that Congress nevertheless intended to create a private of action. Respondents have not, and cannot, sustain that burden.

ARGUMENT

Introduction

The Second Circuit's decision below failed to follow the analytic paradigm established by this Court for deciding whether a private right of action exists under a statute that does not expressly provide for one. As set forth in *Cort* v. *Ash*, 422 U.S. 66 (1975), the test is:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (emphasis in original) (citations omitted) (quoting *Texas Pacific Railroad Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916) (emphasis added)). Although *Cort* established a four-part test, the holding in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-76 (1979), makes it clear that each part of that test is merely a tool for discerning "whether Congress intended to create, either expressly or by implication, a private cause of action." *Id.* at 575.

As the Supreme Court has reiterated on numerous occasions, whether a private right of action exists under any act of Congress is a question of statutory construction. *E.g.*, *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 15 (1979). Resolving this question is thus a matter of divining the intent of Congress.[3] This Court has emphasized that the search for that intent must begin with the language of the statute itself.[4] The intent gleaned from that analysis is conclusive on the question unless there is clear evidence in the legislative history that the intent of Congress was different from that evident on the face of the statute.[5]

Thus, if the statute by its terms does not create a private right of action, and if analysis of the statutory language does not reveal an intent to create one by implication, then only clear legislative history revealing such an intent will be sufficient. *See Rivers* v. *Rosenthal & Co.*, 634 F.2d 774, 792 (5th Cir. 1980).

The Second Circuit reversed the presumptions by inverting the analysis. It first looked to legislative history and demanded that this history reveal a clear intent *not*

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[3] *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575-76 (1976).

[4] *Cannon* v. *University of Chicago*, 441 U.S. 677, 689-90 (1979).

[5] *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 20 (1979).

to create a private right of action even though the statutory language by its terms did not indicate any intent to do so.

The Second Circuit justified this sleight of hand on the basis of seven years of lower court recognition of a private right of action under the Act.[6] The court proceeded on the assumption that unless Congress indicated a clear intent to reverse those decisions, it should be presumed to have acquiesced in them. *Leist* v. *Simplot*, Nos. 7402, 7403, 7404, slip op. at 4062 (July 8, 1980).[7] There is simply no basis in this Court's decisions for a reversal of the presumptions on this ground. While the decision in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), recognized that the existence of case law implying a private right of action can be relevant when examining legislative history, *id.* at 702-03, the Court considered it merely one factor in determining whether Congress intended to create a private right of action, *id.* at 703. The burden switched in *Cannon* only because the especial class requirement was satisfied, not because there was existing case law recognizing a cause of action when the statute was passed. *Id.* at 694.

Finding no clear intent to reject a private right of action, the Second Circuit concluded that such a right exists under the Act. On the contrary, Congress *has* spoken clearly on the question and has rejected a private right of action against FCMs under the Act.

Thus, the Second Circuit erred first in demanding that Congress speak where it had no duty to do so, and, second,

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[6] The first case to recognize a private right of action under the Commodity Exchange Act was *Goodman* v. *H. Hentz & Co.*, 265 F. Supp. 440 (N.D. Ill. 1967).

[7] The case is reported unofficially at 2 Comm. Fut. L. Rep. (CCH) ¶ 12,051.

in not hearing the voice of Congress clearly rejecting such a private right of action.[8]

I.

There Is No Evidence of Congressional Intent to Create a Private Right of Action Against FCMs.

By switching the burden to the opponents of a private right of action, the Second Circuit avoided the difficult questions posed by the absence of any indication, either in the statute itself or in the legislative history, that a private right of action against FCMs exists under the Act. The difficulty is made more acute by the wealth of evidence indicating that Congress did not intend a private right of action to exist against FCMs on behalf of the plaintiffs in this case.

First, when Congress completely reorganized the Act's enforcement provisions, it failed to include a private right of action on behalf of plaintiffs at the same time it expressly created three mechanisms by which plaintiffs could receive compensation for any damages caused by FCMs who may have violated the Act.[9] Second, even though

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[8] This Court has expressly rejected the notion that a court's opinion about the wisdom of creating a private right of action can be a consideration in deciding whether to do so. Instead, "what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 15-16 (1979). *Compare* Friendly, "In Praise of Erie—and of the New Federal Common Law," 39 *N.Y.U. L. Rev.* 383, 405, 419 (1964).

[9] An injured party with a claim of $15,000 or less can elect to seek relief through the informal arbitration procedures each contract market is required to maintain, Act § 5a(11), 7 U.S.C. § 7a (11) (1976); 17 C.F.R. § 180.5 (1980) (contract markets may maintain such procedures for claims in excess of $15,000), and through CFTC reparations procedures, Act § 14, 7 U.S.C. § 18 (1976 & Supp. II 1978). In addition, section 17 of the Act, 7 U.S.C.

Congress explicitly created two rights of action against FCMs—one on behalf of the CFTC and the other on behalf of the states as parens patriae—Congress failed to create a right of action on behalf of the plaintiffs in this case. *See* discussion at pp. 13-14, 16-17 *infra*. Third, implying a private right of action on behalf of plaintiffs would destroy the comprehensive uniform structure Congress created to regulate the commodities industry. *See* discussion at p. 11-12, 14, 17-18 *infra*.

There is therefore not merely an absence of the affirmative congressional intent required before a private right of action can be implied,[10] but there is clear evidence of an intent not to create such a right.

A. *The Language of the Statute Does Not Support the Implication of a Private Right of Action Against FCMs.*

The Act has an elaborate scheme of enforcement mechanisms designed to deter violations of the Act or CFTC rules by FCMs and to provide compensation to persons injured by those violations. Nowhere does Congress mention private rights of action for plaintiffs, although it does expressly provide for actions against FCMs by others. This per se precludes a finding that Congress intended such a right to exist unless there is clear, persuasive evidence in the legislative history to the contrary. *See Trans-*

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§ 21 (1976 & Supp. II 1978), authorizes the creation, with CFTC approval, of registered futures associations. To obtain approval, these associations are required to establish a mechanism for settling customer claims and grievances against the association's members and employes. *Id.* § 17(b)(10), 7 U.S.C. § 21(b)(10) (1976 & Supp. II 1978). An application is currently pending before the CFTC for a national futures association.

[10] This requirement grows in part from constitutional limitations on the ability of the judiciary to legislate. *See Cannon* v. *University of Chicago*, 441 U.S. 677, 730 (1979) (Powell, J., dissenting).

america Mortgage Advisors, Inc. (TAMA) v. *Lewis*, 444 U.S. 11, 20 (1979).

1. Reparations Proceedings.

In 1974 Congress created a mechanism to enable private individuals to seek compensation for damages resulting from violations of the Act. Section 14 of the Act, 7 U.S.C. § 18 (1976 & Supp. II 1978), provides that anyone injured by an FCM who violates the Act can petition the CFTC to institute reparations proceedings. The CFTC is empowered to award damages through those proceedings to the injured party.

Consistent with the Act's intent to make the CFTC the primary interpreter of the Act in order to ensure uniformity of regulation, the CFTC must make an initial determination whether the facts presented in the petition warrant instituting a reparations proceeding, opening an investigation into the charges, or dismissing the complaint.[11] If the CFTC considers it appropriate, formal reparations proceedings are commenced before an administrative law judge. *See* 17 C.F.R. § 12.31 (1980). As in a court proceeding, although with some minor differences, parties may make motions, *id.* § 12.46, and engage in discovery, *id.* § 12.62. If the claim exceeds $5,000.00, a hearing is held on the record, *id.* § 12.71, and objections can be made to evidence as unreliable, irrelevant, or unduly repetitious, *id.* § 12.80. Appeals from the administrative law judge's determinations are to the CFTC, and from there to the circuit

[11] The dismissal is analogous to a federal district court judge's dismissal of a complaint. The CFTC's dismissal of the complaint and its refusal to refer the action to an administrative law judge is appealable to a circuit court of appeals. *See* Act §§ 14(g) & 6b, 7 U.S.C. §§ 18(g) & 9 (1976); Administrative Procedure Act §§ 10(e), 10(b)(2), 2(a)(6), 5 U.S.C. §§ 704, 701(b)(2), 551(6) (1976).

court of appeals. *See* Act § 14(g), 7 U.S.C. § 18(g) (1976 & Supp. II 1978). If the award goes unpaid, it can be filed in federal district court for enforcement. The award is not open to attack in the district court enforcement proceeding. *See id.* § 14(f), 7 U.S.C. § 18(f). The CFTC reparations proceeding is thus similar in many respects to a district court proceeding and was intended to serve the same function as a private right of action.[12]

As in *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 420 (1975), Congress has rested the resolution of questions arising under a statutory scheme with an administrative agency, and a private right of action will therefore not be implied. It would be inconsistent for Congress to expressly provide a means by which injured persons can recover damages from FCMs who violate the Act and at the same time intend that parallel relief be available without expressly providing for it. Moreover, Congress created a number of procedural safeguards for a reparations proceeding which would be lost if a parallel, private right of action exists.

The CFTC is required to reach an independent determination about the merits of the claims before serving the complaint on the FCM and referring the case to an administrative law judge. Act § 14(a), 7 U.S.C. § 18(a) (1976 & Supp II 1978). If the facts as presented in the complaint are inconclusive or do not provide a sufficient basis for pro-

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[12] In his testimony before the House subcommittee considering the CFTC's reauthorization, CFTC Vice Chairman Rainbolt referred to these proceedings as a private right of action. *Extend Commodity Exchange Act: Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 95th Cong., 2d Sess. 64 (1978). The existence of this express remedy further distinguishes the securities law precedents so heavily relied on by the majority below. *See Leist*, slip op. at 4047-50.

ceeding with a reparations hearing, the CFTC is empowered to undertake its own preliminary investigation into the charge. *Id.* § 14(b), 7 U.S.C. § 18(b). This shields FCMs from the expense and inconvenience of defending frivolous suits. Similar protections are lacking for FCMs subject to suit in court under a private right of action.

The Act directs the losing party to pay attorneys' fees and other costs if the prevailing party must enforce the award in district court, *id.* § 14(f), 7 U.S.C. § 18(f), or successfully defend an appeal from the CFTC's decision to the circuit courts, *id.* § 14(g), 7 U.S.C. § 18(g). No similar authorization is made for private rights of action in district court and those costs could not be awarded. *See Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975).

No appeal from a reparations award can be taken unless the appellant "also files with the clerk of the court a bond in double the amount of the reparation award against the appellant conditioned upon the payment of the judgment entered by the court, plus interest and costs, including a reasonable attorney's fee for the appellee, if the appellee shall prevail." Act § 14(g), 7 U.S.C. § 18(g) (1976 & Supp. II 1978). An appeal from a court decision under an implied private right of action would not be subject to any similar requirement. *See* Fed. R. App. P. 7 (appellant must post bond of $250 to cover costs on appeal).

Implying a private right of action would also be inconsistent with Congress' charge to the CFTC to create a uniform, consistent body of law regulating the futures industry. The reparations proceeding provides a central forum for awarding damages to those injured by FCMs who violate the Act.[13] Thus, the CFTC alone decides if the Act has

[13] CFTC Chairman Bagley cited this as a primary reason for retaining the reparations proceedings under the auspices of the

been violated and is in a position to develop a body of consistent decisions interpreting the relevant provisions of the Act.[14] Recognition of a private right of action against FCMs would not only create conflicts in the decisions interpreting the Act, but would also subject them to suit in over one hundred district courts across the country.

2. Suits by CFTC and State Officials.

The right to bring suit is expressly given to the CFTC and to the states as parens patriae for their citizens. Section 6c, 7 U.S.C. § 13a-1 (1976), authorizes the CFTC to sue FCMs and others for an injunction restraining illegal practices or compelling compliance with affirmative obligations imposed by the Act. Section 6d, 7 U.S.C. § 13a-2 (Supp. II 1978), allows state officials to sue for injunctive relief or monetary damages when any person (other than floor brokers, clearinghouses, and contract markets) are violating or have violated the Act. Congess thus expressly granted certain parties the right to bring suit against FCMs. The absence of any mention of that right for others necessarily means that they do not possess that right. *Transamerica Mortgage Advisors*, 444 U.S. at 19-20.

This Court's decision in *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974) (*Amtrak*)—decided two weeks before the House hearings began, four months before the Senate hearings began, and eight months before the conference report

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CFTC instead of transferring them to a futures association. *Extend Commodity Exchange Act: Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 95th Cong., 2d Sess. 632 (1978).

[14] Judicial review is limited to whether the CFTC's determinations are supported by the weight of the evidence, *see Act* § 14(g), 7 U.S.C. § 18(g) (1976 & Supp. II 1978).

was issued—made it clear to Congress that the creation of certain remedies necessarily implies the exclusion of those not mentioned.[15] In finding that no private right of action existed under section 307(a) of the Rail Passenger Service Act of 1970, this Court held that

> [s]ince the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, [the] maxim [*expressio unis est exclusio alterius*] would clearly compel the conclusion that the remedies created in § 307(a) are the exclusive means to enforce the duties and obligations imposed by the Act.

Id. at 458. Therefore, Congress' failure to mention a private right of action against FCMs in the elaborate enforcement scheme it created to ensure that FCMs complied with the Act and to provide adequate compensation for the victims of illegal practices is not silence revealing nothing, but an affirmative indication that it did not intend such a right to exist.

Moreover, as in *Amtrak*, the scope of the rights of action expressly created are carefully circumscribed. The CFTC is prohibited, for example, from proceeding ex parte. Act § 6c, 7 U.S.C. § 13a-1 (1976). State officials cannot sue contract markets, clearinghouses, or floor brokers, *id.* § 6d(1), 7 U.S.C. § 13a-2(1) (Supp. II 1978); they must notify the CFTC of the suit; and the CFTC has the right to intervene in the action and to petition for appeal, *id.*

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[15] The attempt of the majority below to belittle this fact on the ground that "*Amtrak* was decided when the amendments were well on the road to enactment," *Leist*, slip op. at 4091, is thus unpersuasive. The case was decided on January 9, 1974; the House hearings began on January 23, 1974; the Senate hearings began on May 13, 1974; and the conference report was issued in September 1974.

§ 6d(3), 7 U.S.C. § 13a-2(3). It would be incongruous for Congress to carefully limit the rights of action it expressly creates and to intend that another, unstated right of action exist with no restrictions at all. *See Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 736 (1975).

The limitations imposed on state parens patriae proceedings illustrates the special nature of the CFTC's exclusive jurisdiction. Its exclusive jurisdiction is based on a need for a national uniform regulatory system governing the commodities industry. *See Rivers* v. *Rosenthal*, 634 F.2d 774, 779-80 (5th Cir. 1980). To protect that uniformity, the CFTC must be given notice of any proceedings brought by the states under its parens partriae powers to enforce the Act, and it has the right to intervene and to prosecute appeals. This ensures the CFTC's involvement in all interpretations of the Act.

The provision in section 6d(7), 7 U.S.C. § 13a-2(7) (Supp. II 1978), that the creation of a parens patriae proceeding is not intended to prevent state officials from enforcing their *general* civil or criminal fraud statutes in state court is not inconsistent with these restrictions. If suit is brought solely under such statutes, a court will not be required to interpret the Act and there is no possibility of inconsistent interpretations. Accordingly, the CFTC does not have the same interest it has when a state proceeds under its parens patriae authority.

B. *The Legislative History of the Act Does Not Support the Implication of a Private Right of Action Against FCMs.*

The legislative history reveals an intent on the part of Congress to preclude a private right of action against FCMs under the Act.[16] The 1974 amendments completely

[16] Petitioners and nine United States Commodity Exchanges, as *amici curiae*, have addressed the legislative history of the Act prior

reformed the regulatory system governing the commodity futures industry. The amendments were the result of general dissatisfaction both with the scope and the effectiveness of federal regulation. *See* H.R. Rep. No. 975, 93d Cong., 2d Sess. 36-48 (1974). Thus, the two principal changes made by the amendments were to extend federal regulation to cover all commodity trading and to extend federal enforcement by establishing an independent, full-time agency with broad enforcement powers. As part of the effort to expand federal regulatory control, Congress completely revised the enforcement mechanisms available to the CFTC and to private individuals. In so doing, it chose not to create a private right of action for individuals injured by violations of the Act. Instead, it required the exchanges to establish informal arbitration procedures, Act § 5a(11), 7 U.S.C. § 7a(11) (1976 & Supp. II 1978), and estabished a formal reparations proceeding under the auspices of the new CFTC to award compensation to those injured by violations of the Act, *id.* § 14, 7 U.S.C. § 18. Nowhere in the discussion of available remedies is there any mention of a private right of action against FCMs on behalf of the plaintiffs in this case.

The Second Circuit considered this irrelevant because it found evidence that Congress was aware of judicial decisions recognizing a private right of action, and found no legislative intent to reject those decisions. *Leist*, slip op. at 4062. But that argument only goes so far. While it possibly can be said to explain the omission of any mention of the remedy from the Act itself, it fails to explain the omission of any reference to a private right of action in the exhaustive discussions of the available enforcement

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to the 1974 amendments. Accordingly, we do not burden the Court with a repetition of it. Instead, we address the 1974 amendments which also support the conclusion that Congress did not intend to create a private right of action against FCMs under the Act.

and remedial mechanisms in the committee reports. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 24-25, 29, 38-39, 40 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843, 5865, 5868-70, 5877-78, 5879; H.R. Rep. No. 975, 93d Cong., 2d Sess. 2-4, 14-15, 22, 30-31, 67-68 (1974). In explaining the reparation proceedings, the House Report stated that the procedure is "designed to supplement the informal 'settlement procedures' contemplated of the contract markets and registered futures associations." *Id.* at 22. The Committee conspicuously omitted any mention of private rights of action when it described the forum the reparations proceedings were designed to supplement.

Moreover, the majority in *Leist* relied on isolated statements throughout the legislative history that the purpose of the Act was to strengthen regulation and construed those statements to mean that any existing enforcement mechanisms were to be maintained. However, "[i]t is just as reasonable to infer, . . . that this 'strengthening' of the extant regulatory structure was to be accomplished by the centralization in the federal government of a much-enlarged express enforcement structure, and that the 'strengthening' need not include private actions—especially in light of the reparations procedure." *Rivers*, 634 F.2d at 788 n.27.

As with the 1974 reports, the 1978 Senate report on the reauthorization of the CFTC cataloged the means by which the Act protects customers without even mentioning the existence of a private right of action. S. Rep. No. 850, 95th Cong., 2d Sess. 12-13, 32 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 2087, 2100-01, 2120.

In 1978, Congress found certain inadequacies in the existing enforcement mechanisms of the Act. On the reasoning of the Second Circuit, Congress should have been aware when it revised the act in 1978 that various courts were holding that the 1974 amendments had abolished any

private right of action.[17] The same thing was happening with parens patriae suits. State securities commissioners believed that the 1974 amendments had also abolished any parens patriae suits. *See, e.g., Extend Commodity Exchange Act: Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 95th Cong., 2d Sess. 174-75 (1978) (remarks of Conrad Goodkind, Wisconsin Commissioner of Securities). Congress ensured the continued existence of parens patriae suits by expressly granting authority to state officials to bring them within certain carefully circumscribed limits. It took no such action with regard to private rights of action.[18]

Congress apparently considered the judicial denial of private rights of action a salutory development in keeping with the spirit of the 1974 amendments. Otherwise, it would have remedied the situation by expressly providing for a private right of action in the same manner in which it codified the right of state officials to bring parens patriae suits for Act violations.

However, in addition to explicitly providing for parens patriae suits, Congress was careful to ensure that they did not conflict with the CFTC's exclusive jurisdiction and the development of a uniform national regulatory system. S. Rep. No. 850, 95th Cong., 2d Sess. 25-26 (1978), *reprinted*

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[17] *See, e.g., Bartels* v. *International Commodities Corp.*, 435 F. Supp. 865 (D. Conn. 1977); *Consolo* v. *Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F. Supp. 447 (N.D. Ohio 1976); *Arkoosh* v. *Dean Witter & Co.*, 415 F. Supp. 535 (D. Neb. 1976).

[18] It is therefore inappropriate to conclude, as the majority below did, that the 1978 amendments are irrelevant because "Congress was concentrating on *parens patriae* suits; it was not considering a general revision of the CEA," *Leist*, slip op. at 4101. While the Act was not totally revised in 1978, Congress did address problems that had arisen in the Act, and specifically in its enforcement mechanisms, since 1974.

in [1978] U.S. Code Cong. & Ad. News 2087, 2113-14. To preserve the exclusive jurisdiction of the CFTC, registered contract markets and floor brokers were made exempt from suit. "Plenary authority to register, regulate, and, discipline the contract markets and the 'locals' whose activities are generally of the character of pit trading rather than customer contact is reserved to the Commission." *Id.* at 25, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 2113. Congress was concerned that a multiplicity of suits would destroy the uniform system of regulation that it hoped to achieve by establishing the CFTC. Therefore,

> [t]o assure that the body of decisional law developed under this section would be coherent and consistent with national policy, new section 6d provides that States, before instituting an action thereunder, must receive the prior approval of the Commission. State prosecutional discretion would, therefore, be checked only to the degree that contemplated State prosecutions deviate from national policy established by the Commission.

Id. at 26, *reprinted in* [1978] U.S. Code Cong. & Ad. News at 2114; *accord, Extend Commodity Exchange Act: Hearings on H.R. 10285 Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 95th Cong., 2d Sess. 617 (1978) (remarks of John V. Rainbolt, II, vice chairman, CFTC).[19]

It is inconceivable that Congress would have taken such precautions with fifty possible plaintiffs, all of whom are public officials, and yet intended a private right of action

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[19] This provision was later amended to require that states notify the CFTC and to allow the CFTC to intervene as of right and to prosecute appeals. As finally passed, the section more directly ensures CFTC participation in the decisionmaking process.

to exist for millions of private citizens with no restrictions on their right to sue or provisions for CFTC intervention.

Thus, even assuming that the burden is on the opponents of a private right of action to demonstrate that Congress did not intend to create a private right of action, the evidence is conclusive that Congress harbored no such intent. A fortiori, no private right of action can be found if the burden is placed on the proponents of such a right as required by the decisions of this Court. *See, e.g., Cannon* v. *University of Chicago,* 441 U.S. 677, 694 (1979). Moreover, the absence of an especial class, as demonstrated below, creates a heavy presumption against implying a private right of action. That presumption can only be rebutted by a clear showing of persuasive evidence to the contrary. The above analysis demonstrates that this evidence is lacking and plaintiffs cannot meet their burden.

As the unanimous panel of the Fifth Circuit sitting in *Rivers* v. *Rosenthal,* 634 F.2d 774 (5th Cir. 1980), found,

> The net result of our study and deliberations in this case is the determination that the language and legislative history of the CEA and CFTCA, dissected by all of the varied and even conflicting canons of construction, simply do not provide any clear indication of congressional intent either to approve or deny an implied right of action. In such a case, as explained in Part II, supra—given the absence of clear evidence of the requisite affirmative congressional intent to create or provide such a cause of action—we are bound to refuse plaintiffs' suit.

Id. at 792.

II.

The Commodity Exchange Act Was Not Enacted for the Benefit of Any Especial Class.

This Court has repeatedly emphasized that in deciding whether Congress intended to create a private right of action, a primary criteria is whether the statute was enacted for the benefit of an especial class.[20] The Second Circuit, however, failed to deal with the criteria established by the decisions of this Court for determining whether the plaintiffs before it were part of an especial class for whose benefit the Act was enacted.

A. *The Statute Merely Imposes Duties, It Does Not Confer Rights.*

Statutes enacted for the benefit of the general public have been uniformly held not to support the implication of a private right of action.[21] *See, e.g., Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 569-70 (1979); *Cort* v. *Ash*, 442 U.S. 66, 80-82 (1975); *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 469 (1959). In deciding whether the statute was enacted for the benefit of an especial class or the public at large, this Court has looked to whether the statutory

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[20] *E.g., Cannon* v. *University of Chicago*, 441 U.S. 677, 689-90 & n.13 (1979).

[21] While a number of decisions construing the securities laws are an exception to this rule, *e.g., J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), they do not support plaintiff's argument in the case at bar for two reasons: First, their approach has been severely questioned by this Court and their precedential value limited. *See Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 15-16 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 690 n.13 (1979). Second, the statutory language of the securities laws itself provides a basis for implying such a right. *See* Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976).

language confers a right on a specific group or imposes duties on certain persons. The creation of duties and obligations, even if for the primary benefit of one group, is insufficient to sustain a finding that a private right of action exists. *See Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 421 (1975). The Commodity Exchange Act is similar to the act at issue in *Barbour* in that while certain groups can be identified as the primary beneficiaries of the act, the statute creates no rights but merely imposes duties and obligations for their benefit and the benefit of the general public.

A determination that a statute confers a right on an especial class will be based almost exclusively on the statutory language itself. Thus, the Supreme Court in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), based its conclusion that Title IX was enacted for the benefit of an especial class on Congress' specific choice of language. The statute provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance." Education Amendments of 1977, Title IX, § 901(a), 20 U.S.C. § 1681 (1976). The Court found dispositive this specific identification of the benefited class and the express conveyance of a right on that class by the statutory language itself. 441 U.S. at 690-91. The Court stated,

> [T]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disburse-

ment of public funds to educational institutions engaged in discriminatory practices.

Id. at 690-93. The Court distinguished the alternative language considered by Congress from the language of the statute actually passed. As originally proposed, the statute only prohibited the Secretary of Health, Education, and Welfare from making any "grant, loan guarantee, or interest subsidy payment" to any institute of higher education that discriminated on the basis of sex. *See id.* at 693 n.14. The Court indicated that this mere intent to benefit a particular class without the conveyance of a right on that class would have been insufficient.[22]

The Second Circuit not only failed to correctly analyze the relevant statutory language against this criteria, it failed to address the issue at all. If it had, it would have recognized that the Act is written solely in terms of duties and obligations; nowhere does it confer a right on any group.

Plaintiffs here seek to find an implied cause of action against FCMs under sections 4a, 4b, and 9(b) of the Act, 7 U.S.C. §§ 6a, 6b & 13(b) (1976).[23] Sections 4a and 4b, like the original proposed language of the statute discussed in *Cannon*, make unlawful (*i.e.*, prohibit) certain conduct and do not create rights in any private person. Section 4a prohibits any person from exceeding CFTC established position limits. Section 4b prohibits FCMs and other con-

[22] The Fifth Circuit recently relied on this distinction in refusing to imply a private right of action on behalf of workers paid less than the minimum wage by government contractors in violation of the Davis-Bacon Act, 40 U.S.C. § 276(a). *United States* v. *Capeletti Brothers, Inc.*, 621 F.2d 1309, 1314 (5th Cir. 1980).

[23] While the complaint fails to specify which sections of the Act defendants allegedly violated, we assume, as did the court below, that plaintiff relies on sections 4a, 4b, and 9(b) of the Act, 7 U.S.C. §§ 6a, 6b & 9(b) (1976).

tract market participants from, *inter alia*, cheating or defrauding certain other persons in connection with a futures transaction.[24] Section 9(b) imposes criminal sanctions on those who violate certain other sections of the Act.[25] Even assuming that the purpose of these sections is to protect those trading in the market, that does not make all traders an especial class for whose benefit the Act was passed.

As this Court held in *Touche Ross & Co.*, *Cannon*, and *Barbour*, it is insufficient to find that an act was passed to protect investors. The statute must expressly confer a right. The act in question here does not do so; like the original draft of Title IX, it merely imposes a duty on those engaged in the sale of commodities futures.

A finding that a statute was not enacted for the benefit of an especial class creates a heavy burden on the proponent of a private right of action to demonstrate through legislative history that Congress *clearly* intended such a right to exist. *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 20 (1980). The Second Circuit failed even to engage in this analysis. The evidence, as marshalled by Judge Friendly writing for the majority below, does not meet this burden.

Judge Friendly relies on the absence of any clear intent to preclude a private right of action and random, isolated statements by various Congressmen indicating an aware-

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[24] Whatever the resemblance of section 4b of the Act to the antifraud provisions of the Securities Exchange Act, the Supreme Court has made it clear that its finding of an implied private right of action under section 10(b) of the Securities Exchange Act (15 U.S.C. § 78j(b) (1976)) has no such precedential value. It has, for example, refused to imply a private cause of action under a similarly worded provision in the Investment Advisors Act. *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11, 19-24 (1979).

[25] Criminal statutes are generally enacted for the benefit of the public as a whole, not an especial class. *See Cort* v. *Ash*, 422 U.S. 66, 81 (1975).

ness, but never affirmative approval, of existing case law recognizing a private right of action. Judge Friendly cites to two references in the House Report to private rights of action against exchanges, which, the Report notes, were causing the exchanges to reduce their regulations to avoid increased liability, *see Leist*, slip op. at 4072-73 & n.28, and one statement by Congressman Poage and one statement by Congressman Thone, *id.* at 4074-75 & n.29. These Report statements are in the context of an eighty-six page analysis, and the two statements on the floor are in the context of seventy-three pages of congressional debate. None of the statements refer to FCMs and none indicate approval of a private right of action.

Judge Friendly also refers to statements by two different representatives of the various New York commodity exchanges before the House committee in which the spokesmen urged Congress to insulate the exchanges from liability, *id.* at 4076, and a letter from Continental Grain warning of the problems of class action litigation and advocating the establishment of arbitration and agency settlement procedures, *id.* at 4076-77. None of these statements indicate approval of a private right of action, only the Continental Grain letter refers to FCMs, and there are no congressional statements at all on this topic in the hearings. Moreover, these three statements are in the context of 332 pages of hearings.

Judge Friendly also cites three statements in the Senate hearings—two by Professor Schotland and one by Senator Clark—that "expressed the view that private actions were available under the Act." *Id.* at 4077. However, the statement of Senator Clark only advocated the adoption of his own bill that expressly provided for a private right of action. ***Commodity Futures Trading Commission Act: Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 Before the***

Senate Comm. on Agriculture and Forestry, 93d Cong. 2d Sess. 205 (1974). Senator Clark's bill was never adopted. In addition, the two statements by Professor Schotland only expressed approval of Senator Clark's bill and advocated expressly providing for a private right of action. *Id.* at 737, 746. Contrary to the inference drawn by Judge Friendly, Professor Schotland's statements implied that if Congress failed to expressly provide for a private right of action, none might exist given the alternative vehicles for enforcement and compensation provided by the Act. *See id.*

Thus, the references cited by the majority in *Leist* fall short of the clear, persuasive evidence required by the case law of this Court.

B. *Plaintiffs Are at Best Secondary Beneficiaries of the Act.*

Even asuming *arguendo* that section 4a, 4b, and 9(b) of the Act were created for the benefit of an especial class, plaintiffs are certainly not within it. The plaintiffs in the case at bar are speculators, and the Second Circuit went to great lengths to establish that speculators are not the pariahs of futures trading. *Leist*, slip op. at 4063-70. While this is true, it is also irrelevant.

The statutory language and the legislative history both recognize the legitimate role of the speculators in creating market liquidity and in accepting the risks hedgers are unwilling to bear. H.R. Rep. No. 975, 93d Cong., 2d Sess. 138 (1974). To attract speculators to the market, the Act affords them certain protections. *See, e.g.*, Act § 4b, 7 U.S.C. § 6b (1976). But the Supreme Court has held that a private right of action can only be implied in favor of a statute's primary beneficiaries. *See Cort* v. *Ash*, 422 U.S. 66, 81 (1975). It is clear that the Act is intended primarily for the benefit of producers and consumers. For example, section 3 of the Act, 7 U.S.C. § 5 (1976), sets forth the reasons

for the statute and the importance of futures trading for the national economy. After detailing how various parties rely on the price discovery mechanisms of the futures market, the section states,

> The transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the *producer* or the *consumer* and the *persons handling commodity and products and byproducts thereof* in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein.

Id. (emphasis added). A similar purpose is evident in section 4a, 7 U.S.C. § 6a (1976), which authorizes the CFTC to set daily trading limits and prohibits any person from exceeding them. It was passed, by its very terms, to protect the market from excessive speculation that distorts market prices to the detriment of those who use the market as a vehicle for hedging and price discovery.

The legislative history of the 1974 amendments supports this interpretation. The 1974 House Report states,

> The major objectives of CEA [Commodity Exchange Authority, predecessor of the CFTC] in the enforcement of the Commodity Exchange Act, are to protect the price and hedging services of the commodity futures markets. These services are widely used by farmers, merchandisers, and processors. To carry out its enforcement objectives, CEA works to maintain

> fair trading practices and competitive pricing on commodity exchanges; and to prevent price manipulation, cheating, fraud, and abusive acts and practices in commodity transactions.

H.R. Rep. No. 975, 93d Cong., 2d Sess. 36 (1974).[26] In fact, the incentive for the 1974 amendments came from hedgers and producers, *id.* at 36, who complained that the existing statutory scheme was insufficient to control the manipulative activity of speculators, which "distorted the traditional relationships between cash and futures prices," *id.* at 48.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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[26] *Accord,* H.R. Rep. No. 975, 93d Cong., 2d Sess. 62, 63, 76, 82 (1974); S. Rep. No. 1131, 93d Cong. 2d Sess. 14, 18, 46 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843, 5856, 5859, 5885.